

MEMORANDUM OF LAW

DATE: September 16, 1992

TO: Alberto P. Rechany, Contract Specialist, Clean
Water Program

FROM: City Attorney

SUBJECT: City Manager's Change Order Authority

In a memorandum dated August 26, 1992, you requested the opinion of this office on a question relating to the authority of the City Manager to approve change orders in construction contracts. Your interest in asking this question is a concern for expeditious approval of change orders in cases where the extra work is disputed and the City unilaterally directs its performance. There is a concern that a delay in the City's formal authorization of such a change order may constitute grounds for the contractor to claim delay damages. Your interest, then, is in knowing the parameters of when change orders may be effected by City Manager's action, as opposed to the more time-consuming (due to routing, noticing, docketing, etc.) City Council approval process.

The City Manager's authority to approve change orders stems from San Diego Municipal Code ("SDMC") section 22.0209:

Section 22.0209 Alterations in
Contracts

Whenever it becomes necessary
to make alterations in contracts
entered into by the City, the City
Manager shall make alterations only
when authorized by the Council unless
such alterations meet all of the
following criteria:

- (a) The cost of each
alteration is less than \$100,000; and
- (b) The cost of alterations
does not exceed the total amount
authorized for the project by
ordinance or resolution; and
- (c) It is the opinion of the

City Manager that the alterations are necessary to fulfill the purpose of the contract; and

(d) The alterations are made by agreement in writing between the contractor and the City Manager.

These criteria are self-explanatory, and unless all are met in any given case, the City Council must itself approve the change order. If all four conditions are met, the City Manager or his designee may approve the change order.

This arrangement of authority can be reconciled with the Green Book standard specifications of the contract because the Green Book is unconcerned with the internal decisional processes of the parties. Section 3 of the Green Book addresses Changes in Work, and refers to the owner only as "the Agency" without any mention of how its inter-agency decisional authority is allocated. The Green Book assumes the decisions of each party. For example, section 3-5 covers "Disputed Work" directed to be performed by the Agency where no agreement on the disputed work can be reached with the contractor. Such an order would presume completion of the Agency's internal decision. In such a case, before the City can order the extra work to be performed, an internal estimated evaluation should be made of the disputed work to determine if all the criteria of SDMC section 22.0209 are met, and thus whether the unilateral change order requires Council approval.

We understand your main concern to be the condition of subsection (a), the \$100,000 limitation on the Manager's authority, especially as this will relate to some of the more sizeable projects of the Clean Water Program. One example of a potential problem is the contract to extend the Ocean Outfall from the Point Loma Wastewater Treatment Plant. Change orders which exceed \$100,000 may be more reasonably expected in a contract which has a price in excess of \$54 million than they would be in City contracts of lesser scale. If each such change order must be put to vote of the City Council as SDMC section 22.0209 requires, your apprehension is that delays in the work may occur, and that damages could follow.

In response, it must be observed that the \$100,000 limitation on the City Manager's change order authority is imposed by ordinance of the City Council. The Council has determined that this limit applies to all contracts regardless of price magnitude. No exceptions have been provided in SDMC section 22.0209, and thus the ordinance would require amendment by the City Council if any exception were to be made.

Absent amendment of the ordinance, the Clean Water Program should use its best foresight on these potential large change orders so that when they do arise, they may be expeditiously considered by the City Council. To this end, this office will expeditiously process time-sensitive change orders to assure the prompt docketing including supplemental, if appropriate, under Administrative Regulation 3.20 and City Manager's memorandum of June 2, 1992. We appreciate that this may at times be difficult due to the very uncertainties which make change orders necessary, but simply recognizing this possibility in advance may in the end save time when the need arises.

Also, we should point out that the procedure for approving change orders, as a matter dictated by law, is really beyond the City's and contractor's control. Section 6-6.1 of the Green Book provides that the contractor is entitled to an extension of time for delays that are beyond its control, but in light of such extension, no damages or additional payment will be due. Section 6-6.3 of the Green Book covers delays caused by the City. The contractor would only be entitled to damages "if such delays are unreasonable in the circumstances involved and were not within the contemplation of the parties when the contract was awarded" Since both the Contractor and City are aware when the contract is awarded that change orders exceeding \$100,000 will require the approval of the City Council, we do not believe damages could be assessed for a reasonable time taken to fulfill this legal requirement.

Hopefully, this response satisfies your inquiry. Please call if you require further information.

JOHN W. WITT, City Attorney

By

Frederick M. Ortlieb

Deputy City Attorney

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